IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

No. 276

MASSOUD ABDALLAH HIRICK,

*Petitioner,*

—against—

ORION SHIPPING AND TRADING CO., INC., PACIFIC CARGO CARRIERS CORPORATION, and UNITED STATES OF AMERICA,

*Respondents.*

## BRIEF FOR RESPONDENTS ORION SHIPPING AND TRADING CO., INC. AND PACIFIC CARGO CARRIERS CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT


NICHOLAS J. HEALY, III
*Counsel for Respondents*
*Orion Shipping & Trading Co., Inc.*
*and Pacific Cargo Carriers Corporation*
Office & P. O. Address
52 Wall Street
New York 5, N. Y.

ALLAN A. BAILLIE
THOMAS L. ROHRER
*Of Counsel*

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### Statement of the Case

Pursuant to the provisions of Rule 40, Section 3, respondents Orion Shipping & Trading Co., Inc., and Pacific Cargo Carriers Corporation will limit their statement of the case to correcting inaccuracies in the petitioner's statement of the questions presented. Petitioner's questions numbered "2", "3" and "4" are directed to the admissibility in evidence of testimony given at a Coast Guard investigation (Question 2); "written reports of the Coast Guard obtained from" ship's officers and ship's crew (Question 3); and Coast Guard records of an investigation of a marine disaster (Question 4).

At the trial of the action below there were no records or evidence introduced or sought to be introduced which might fit into such categories, save one. There was no Coast Guard investigation of the incident which gave rise to petitioner's alleged injuries and, therefore, no testimony before the Coast Guard and no records whatsoever prepared by the Coast Guard.

The one document which might be included under the three questions presented by petitioner was a copy of a "report of marine casualty" prepared by the master of the vessel on the pertinent Coast Guard form, the original of which was filed with the Coast Guard at an American port. This document, among others, was made available to petitioner's attorney as part of the pre-trial discovery proceedings without any stipulation being made as to its admissibility. At no time during the trial were any documents or records or even the original of the master's report on file with the Coast Guard, subpoenaed from the official records maintained by the Coast Guard.

In view of the foregoing, respondents will only concern themselves in the succeeding argument with petitioner's first question presented and with the exclusion of the "report to marine casualty".

As the above will indicate, the valid questions presented are already greatly circumscribed. The rules of evidence pertinent to the remaining issues do not raise substantial questions of law to which this Court should devote its valuable time. As the succeeding argument attempts to indicate there is no conflict between the decisions of the Circuit Courts; in fact, the decisions are consistent and in harmony with a developing rule of law.

## ARGUMENT

### I

**Statements of a master and other officers taken by a shipowner do not constitute admissible evidence in a personal injury action unless proper grounds are presented for their admissibility.**

Petitioner invalidly assumes as the basis of his argument that such statements were erroneously excluded by the trial court, that the statements were made in the "regular course of business". This Court has already ruled that statements of employees given to their employer in connection with an accident are not admissible as being made in the "regular course of business" within the purview of 28 U. S. C. §1732 (superseding 28 U. S. C. §695) unless it was the regular course of such business to make such a record. *Palmer* v. *Hoffman*, 318 U. S. 109 (1942).

In the *Palmer* case it was held that it was not the "regular course of business" of the Railroad there involved to take and record statements of its employees involved in accidents. The business of the railroad was to operate the railroad. Similarly, the taking of statements of its employees is not the regular business of the respondent shipowner here. Respondents' business is the ownership and operation of ocean-going vessels in world-wide trade.

Petitioner urged in his appeal to the United States Court of Appeals for the Second Circuit that the statements were admissible as "admissions against interest". The Court of Appeals properly held that where nothing in the excluded statements in any way contradicted the ship's log admitted in evidence or contradicted the position respondents took at trial, the exclusion of the statements was not erroneous.

There is no conflict between the decision below and the decision of the United States Court of Appeals for the Fifth Circuit in *Cox* v. *Esso Shipping Co.*, 247 F. 2d 629 (1957) as urged by petitioner as grounds for the granting of certiorari. Respondents urged the Court of Appeals below to follow the reasoning of the *Cox* decision. The Fifth Circuit had stated:

> "For an admission, rightly understood but so often confused, in its classic prototype is merely—but significantly—a position taken by the adversary, either personally or through an authorized agent, which is contrary to and inconsistent with the contention now being made in the litigation. It is that simple. It need not have been, and is so often said, an admission against interest, nor is there a need to lay a predicate for its use. All that is needed is an authoritative statement by the adversary inconsistent with the contemporary litigation position." 247 F. 2d 632.

In the *Cox* case, a master's "report of marine casualty" was admitted because it was properly held to be an admission against interest, the master having testified in person and having taken a contradictory position to that taken in the report.

Even assuming that the statements were admissible as admissions against interest, only the statement by the master of the vessel could bind the respondent shipowner as the admissions of an authorized agent. *The Patomac*, 5 Wall. 590 (1869); *Naylor, Adms.* v. *Isthmian S.S. Co.*, 187 F. 2d 538 (2d Cir., 1951). The master's statement made no reference to the petitioner or to any injuries sustained by the crew. It merely expanded the facts stated in the entry made in the ship's log, which log was admitted in evidence. As such, the master's statement was only cu-

lative and the Court of Appeals below so held. The admissibility of cumulative evidence must be left to the sound discretion of the trial judge. See *Lancaster v. Kane*, 327 U. S. 645 (1946).

## II

**The exclusion of the master's "report of marine casualty" by the trial court was not clearly erroneous nor has petitioner shown that he was prejudiced by the exclusion.**

Where a "report of marine casualty" is filed with the U. S. Coast Guard pursuant to statutory regulations, it would appear to be the weight of authority that the report is properly admissible in evidence. *Sterbera Dredging Co. v. Moran Towing & Transp. Co.*, 196 F. 2d 1002, 2d Cir., 1952); *Cox v. Esso Shipping Co.*, supra. However, regardless of the basis for admissibility of the document, a proper foundation and identification of the document must be made. As stated by Judge Learned Hand in the *Sterbera* decision:

> "As for the authority, the letter was an official report, *produced from the custody of those to whom the law directed it to be delivered*.
>
> "On the new trial Beale may of course contradict the letter, but it will be admissible as such, *if it is produced by the Coast Guard*." 196 F. 2d 1004, 1005. (Emphasis supplied)

The exclusion of the report in question at the trial below was made on the ground that the document was not properly identified nor was its authenticity established since it was not produced by the Coast Guard. This is made clear

by the following portion of the colloquy taken from the trial transcript between the Court, Mr. Rassner, attorney for the plaintiff-petitioner, and Mr. Baillie, attorney for defendants-respondents Orion and Pacific:

"[450] Mr. Rassner: I do not intend to call any additional people as witnesses but I do want to offer in evidence certain documents.

May the record show that in lieu of an examination before trial of the defendant I have been furnished by Mr. Allan Baillie of the defense counsel certain records, including this paper, which I would like to have marked for identification.

(Marked Plaintiff's Exhibit 24 for identification)

Mr. Rassner: I submit to your Honor that Plaintiff's Exhibit 24 for identification is the master's report, the report of marine casualty or accident. I offer it in evidence. This is the report of the master furnished to me by defendant's counsel in lieu of an examination before trial. I offer it in evidence.

Mr. Baillie: May I see what it is?

The Court: Any objection?

Mr. Baillie: May I see what it is, your Honor?

(Handed to Mr. Baillie)

Mr. Baillie: Your Honor, in the first place, this is not a report made to the owners of the vessel.

The Court: Do you object?

Mr. Baillie: Yes, your Honor.

[451] The Court: In the absence of some proof of the circumstances under which this was made, I will sustain the objection.

Mr. Rassner: May I respectfully except, particularly in view of the fact that it was furnished in lieu of an examination—

The Court: I don't care—

Mr. Rassner: May I make the statement on the record?

The Court: I will take your statement as an unproved statement. I do not know anything about it. There is no stipulation on the record about it.

Mr. Rassner: Well, I just want to make my statement for the record. I do not intend this as an argument but I take exception to your Honor's ruling on the ground that this was furnished to plaintiff's counsel in lieu of an examination before trial of the defendant, and also on the ground that this is entitled to be received—

The Court: I make my ruling on this basis, that if this was an entry which was made in the regular course of business, like a ship's log or something like that, then without further proof we will take it, *but there is no background evidence as to what this is. This is a form with some words on it. I do not know anything* [452] *about it.* It may have been made out in the regular course of business, it may not, but in the absence of some proof as to how this happened to be in the ship, I will sustain the objection.

Mr. Rassner: And may I state my exception, the reasons for it on the record?

The Court: No, your objection means nothing except that you reserve a ground for appeal.

Mr. Rassner: Well, I reserve my ground for review of your Honor's ruling on that.

The Court: All right." (Emphasis supplied). (R., pp. 11a, 12a of Appendix of Plaintiff-Appellant in Court of Appeals below).

Had the proper foundation been laid for the introduction of the report and its authenticity established by its produc-

tion, by the Coast Guard, the trial court might still in its discretion have excluded the report as cumulative. Clearly, therefore, the trial court's ruling excluding the master's report was not clearly erroneous.

As stated in petitioner's brief on page 9, "the jury obviously disbelieved petitioner's contention that the chlorine gas came in contact with his person and caused him any pain, suffering or disability". Petitioner's argument, however, that the report if admitted in evidence would have changed the jury's verdict is without any logical or persuasive basis. As previously stated, the report did little more than corroborate the log entry. At no time did the respondents deny the basic facts of the occurrence.

Petitioner makes no attempt to indicate how he was prejudiced by the exclusion of the documents referred to, other than to state that "no living person" can know. This Court stated in *Palmer* v. *Hoffman*, *supra*:

> ". . . We cannot say that the ruling was prejudicial even if we assume it was erroneous. Mere 'technical errors' which do not 'affect the substantial rights of the parties' are not sufficient to set aside a jury verdict in an appellate court. [February 26, 1919] 40 Stat. 1181, c. 48, 28 USCA § 391. He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted. That burden has not been maintained by petitioners." 318 U. S. 116.

Respondents here urge the applicability of the above stated rule as well as the adoption of the concluding sentence.

## CONCLUSION

**For the foregoing reasons, respondents respectfully submit that the petition herein is devoid of merit and should, therefore, be denied.**

Respectfully submitted,

NICHOLAS J. HEALY, III
*Counsel for Respondents*
*Orion Shipping & Trading Co., Inc.*
*and Pacific Cargo Carriers Corporation*

ALLAN A. BAILLIE
THOMAS L. ROHRER
*Of Counsel*